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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 145 52608

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 11 2003

IN RE: Petitioner:
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

PUBLIC COPY

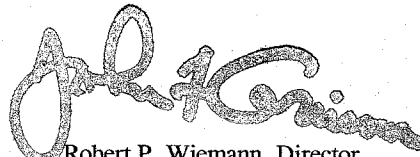
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Hawaii in August 1997. It is engaged in the design and export of Hawaiian style apparel and surfboards. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Bureau erred in determining that the beneficiary was not an executive or manager.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially submitted a description of the beneficiary's duties as follows:

As the President and General Manager, [the beneficiary] has been and will continue to be responsible for directing and developing the day-to-day operation of the company, performing the following duties: Hire, fire, and promote employees. Plan and prepare work schedules and assign employees to specific duties. Analyze sales statistics to formulate policy and to assist stores to increase business volume. Review market analyses to determine customer needs, volume potential, and price schedules. Establish financial goals and budgets for the business. Conduct market research and develop new market for company products.

The director requested that the petitioner provide a detailed description of the beneficiary's job duties as well as an organizational chart describing the petitioner's managerial hierarchy and staffing levels. The director also requested copies of the petitioner's wage reports submitted to the pertinent state entity.

In response, the petitioner described the beneficiary's specific duties as follows:

Screen, hire, fire, and promote employees (all of our current employees were hired by [the beneficiary]). Plan and prepare work schedules and assign employees to specific duties including employees of the apparel section, the e-commerce technology section, and the administrative section. Review market analyses to determine customer needs, volume potential, and price schedules ([the beneficiary] makes the final determination on the price of all of our products and services). Establish financial goals and budgets for the business. Monitor and authorize expenditure to ensure efficiency of operations (decisions on all major expenses such as employees' salaries, and major equipment purchases are made by [the beneficiary]). Review market research to determine market trend, and to expand our operations ([the beneficiary] made the decision to expand our operation into the e-commerce technology field). Review financial statements prepared by company's accountant to evaluate our

company's financial position to make financial decisions such as financing additional projects to increase profitability. Negotiate and sign all major contracts on behalf of the company.

The petitioner also provided its organizational chart depicting the beneficiary as its president. The organizational chart also depicted a general manager/merchandiser, a design controller, a production controller, an individual in charge of sales promotion, and a general manager in charge of internet marketing.

The petitioner also supplied its Hawaii State Employment Quarterly Wage Reports for the pertinent quarter covering the date the petition was filed. The Hawaii Wage Report reflected five employees. The five employees corresponded to individuals holding the positions of general manager/merchandiser, design controller, production controller, and general manager of internet marketing. Two employees on the wage report were not described by name on the organizational chart. The petitioner also submitted its payroll records for the 2001 year. The payroll records revealed that the general manager of internet marketing was hired in June of 2001, a month and a half after the filing of the petition.

The director determined that the beneficiary could not be classified as an executive because the petitioner's type of business did not reasonably require an executive and that the petitioner did not have sufficient employees to relieve the beneficiary from performing non-qualifying duties. The director also determined that the beneficiary could not be classified as a manager because the beneficiary's position was a first-line supervisory position over non-professional employees. The director further determined that the beneficiary was not a functional manager as the petitioner had not demonstrated that the beneficiary primarily directed or managed a function rather than performing the function.

On appeal, counsel asserts that the Bureau's determination that the petitioner's business does not require an executive is arbitrary and erroneous. Counsel also asserts that the petitioner's type of business is irrelevant in determining whether the beneficiary's position is an executive or managerial position. Counsel further asserts that the beneficiary supervises two managerial employees and as he manages the company's entire operations he also manages an essential function or department, or subdivision of the organization. Counsel submits that the beneficiary clearly qualifies as an executive and manager.

The director's subjective statement that the petitioner's business does not require an executive is improper without an adequate explanation or foundation. However, the director's determination is not erroneous and further, contrary to counsel's assertion, the petitioner's type of business is relevant especially in light of the general and unsubstantiated description of the beneficiary's

duties as provided by the petitioner. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5).

In the instant case, the petitioner provided a vague position description that refers, in part, to duties such as "directing and developing the day-to-day operation of the company," and "[a]nalyze sales statistics to formulate policy," and "[r]eview market analyses to determine customer needs, volume potential, and price schedules," and "[e]stablish financial goals and budgets for the business." Not only do these statements bear a marked resemblance to the criteria found in the definition of managerial and executive capacity the statements also do not sufficiently convey an understanding of the beneficiary's actual daily duties. It is not possible to determine from the statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's further description of the beneficiary's duties includes hiring, firing, and promoting employees as well as planning and preparing work schedules and assigning employees to specific duties. These duties and the beneficiary's involvement with market research are indicative of an individual providing basic services to the petitioner. The petitioner's response to the director's request for evidence does not further enlighten the Bureau regarding the beneficiary's daily duties. The petitioner re-states the initial description and adds a statement meant to provide an example of the beneficiary performing the various functions described. However, the descriptions of the beneficiary's duties are not sufficiently comprehensive to conclude that the beneficiary primarily performs in an executive or managerial capacity.

The Bureau, thus, looks at the petitioner's type of business, the number of staff, and other evidence in the record to assist in a determination of the beneficiary's primary activities. In this instance the petitioner is an export company engaged in designing and exporting apparel and surfboards. At the time of filing the petition, it employed a general manager/merchandiser, a design controller, a production controller, and two other individuals not identified on the petitioner's organizational chart.¹ The

¹ A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The employees depicted on the

petitioner indicates on its organizational chart that each of the individuals identified on the chart outsource work to other companies but the petitioner does not provide independent documentation of that outsourcing. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record as it stands contains insufficient information to demonstrate that the beneficiary will be relieved of primarily performing non-qualifying duties in the course of his everyday activities. The petitioner has not met its burden of proof in demonstrating that the beneficiary plans, organizes, directs, and controls the organization's major functions and work through other employees rather than the beneficiary, himself, primarily performing the organization's necessary operational tasks.

Counsel's assertions that the beneficiary supervises two managers or at the very least manages an essential function is unsubstantiated. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not provided a sufficient job description for the individual identified by counsel as the manager of the petitioner's administrative functions. The petitioner has not provided evidence that it employed the manager of the information technology function at the time the petition was filed. The petitioner has not provided an adequate description of the essential function(s) managed by the beneficiary. Stating that managing the company's entire operations is an essential function is not sufficient. As noted above, the petitioner has not provided adequate evidence that the beneficiary actually manages the organization rather than actually performing the operational functions of the organization.

The Bureau must look at the reasonable needs of a company if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. In this case, by determining that the petitioner does not have sufficient staff on hand to relieve the beneficiary of performing non-qualifying duties, it is implied that the Bureau is considering staffing levels. The petitioner in this case has not provided substantive information regarding the duties of the beneficiary's subordinates and has not provided independent evidence of the use of outsourcing services by the petitioner. The petitioner has provided only a broad position description for the beneficiary. It is not possible to determine from the information contained in the record that the reasonable needs of the petitioner could be met by the staff on hand at the time the

organizational chart but not included on the petitioner's Hawaii Quarterly Wage Report or supported by independent evidence cannot be considered in the determination of the beneficiary's eligibility.

petition was filed. The petitioner has not provided sufficient information to meet its burden of proof on this issue.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and at most indicate that a majority of his duties relate to the performance of basic operational tasks for the petitioner. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary at the time of filing the petition had been or will be employed in either a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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